No. 26.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANCISCA L. DE MARTIN, *Appellant,*

v.

JAMES PHELAN, *Appellee.*

Appellant's Supplemental Brief.

GEORGE D. COLLINS,
Counsel for Appellant.

Filed April 18 1892.

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Clerk.

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I.

Gross inadequacy of consideration coupled with a necessitous condition on the part of the vendor of which the vendee had full knowledge at the time of the transaction, are sufficient in equity to justify the inference *prima facie*, that the deed was procured by

undue influence; and especially is it true where there existed between the parties a financial relation which conferred on the vendee a power and influence over the vendor, the natural tendency of which was to impair the vendor's free agency and to subject him to the rapacity of the vendee. This principle is particularly applicable to the relation of mortgagor and mortgagee.

In *Chesterfield v. Janssen*, 2 Ves., 155, Lord Hardwicke in classifying the different cases of fraud, actual and constructive, mentioned as the second class those cases where "It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains;" and as the third class he enumerated "*Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance.*"

This constructive fraud is known to modern law as undue influence, and the principle itself is expressively and instructively applied by the following authorities, all of which fully sustain appellant's position:

Wood *v.* Abrey, 3 Mad. Ch., 423.

Underhill *v.* Harwood, 10 Ves., 219, per Lord Eldon.

Proof *v.* Hines. (Cases temp. Talbot, 111.)

Hough *v.* Hunt, 2 Ohio, 495.

Brown *v.* Gaffney, 28 Ill., 149 (case of mortgage).

McCants *v.* Bee, 1 McCord Ch., 385.

McCormick *v.* Malon, 5 Blackf., 531.

Brown *v.* Campbell, 2 A. K. Mar., 127.

Harding *v.* Wheaton, 2 Mason, 388.

Hyndman *v.* Hyndman, 19 Vt., 13.

1 Story Equity Jurisprudence, § 239.

3 Leading Cases in Equity, pg. 140, Third American Edition. (Hare & Wallace's notes.)

The averments of the bill are sufficient.

Whelan *v.* Whelan, 3 Cowen, 571, 572.

II.

Under the circumstances narrated in the bill, the deed stands as security for the re-payment of the debt due the appellee ; in other words, equity construes the transaction to be a mortgage, and holds it ineffective to convert the previously-existing relation of mortgagor and mortgagee into that of vendor and vendee.

2 Jones on Mortg., § 1,046.

"The parties will be held to their original relation of mortgagor and mortgagee, unless the transaction shall, upon a close examination of its circumstances, appear to be perfectly fair and no advantage taken of the latter by the former."

Schekel *v.* Hopkins, 2 Md. Ch., 90.

"Unless the transaction appears to be fair and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor."

Dougherty *v.* McColgan, 6 Gill & J., 275.

"The question, then, for the Chancellor to ascertain, when the mortgagor seeks to redeem, after an absolute sale to the mortgagee of the equity of redemption, is: Has the mortgagee used his mortgage for the purpose of coercing the mortgagor to sell him the equity of redemption for less than its value, and for less than others would have given, at a fair sale; and if the Chancellor find that such influence was used in the purchase of the equity of redemption, and that this influence produced the results described; that is, benefit or advantage to the mortgagee, and prejudice to the mortgagor by selling his right to redeem for less than its value, and less than others would give for it, then he ought to interfere, and hold that the mortgagor may still redeem."

Goodman *v.* Pledger, 14 Ala., 118.

"*To give validity* to such a sale by the mortgagor, it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth."

Villa *v.* Roderiguez, 12 Wall., 339.

Therefore the transaction having failed to convert the relation of mortgagor and mortgagee into that of vendor and vendee, the limitation prescribed by law within which a bill to redeem may be filed, is found in Section 346 of the Code of Civil Procedure of California, and that section is as follows, viz.:

"An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage."

Jarvis *v.* Woodruff, 22 Conn., 548;
Hughes *v.* Edwards, 9 Wheat., 489;
Slicer *v.* Bank of Pittsburg, 16 How., 571.

Under the interpretation of this section by the Supreme Court of California in *Hall vs. Arnot, 80 Cal., 355, 356,* the bill does not show laches. The obnox-

ious transfer was made November 4, 1881, the bill was filed September 16, 1890, and it avers the absence of the appellee from the State, for the period of four years, intermediate that time, and Section 351 of the Code of Civil Procedure provides that "if after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." Besides, if the averments of the bill are sutained, the appellee will be chargeable as a trustee *ex maleficio* (2 Pom. Eq. Jur., § 1,053, 1 Perry on Trusts, § 166), and the period of limitation would not preclude the maintenance of a suit at any time within ten years.

Wood on Limitations, § § 59, 60;
Varick *v.* Edwards, 1 Hoff. Ch., 383;
Hall *v.* Russell, 3 Sawy., 515, 516;
Manning *v.* Hayden, 5 Sawy., 380;
Michoud *v.* Girod, 4 How., 561.

Respectfully submitted,

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